

COURT OF APPEALS
DIVISION TWO

ECKERSTROM, Presiding Judge.

¶1 A jury found appellant Jose Manuel Padilla guilty of two counts of sale of cocaine base, a narcotic drug, weighing 750 milligrams or more. The trial court sentenced him to concurrent, mitigated, four-year prison terms on these charges, with forty-eight days' credit for presentence incarceration. Padilla argues on appeal that the trial court violated his right to counsel. We find otherwise and affirm his convictions and sentences for the reasons set forth below.

Factual and Procedural Background

¶2 An undercover police detective twice purchased cocaine base from Padilla, in April and May 2004. A grand jury indicted Padilla over a year later, and he was arrested pursuant to a warrant in October 2005. He then requested and received court-appointed counsel.

¶3 In February 2006, the court scheduled his trial for June 27, 2006. For reasons not fully explained in the record, the court also confirmed that Padilla's appointed counsel had no conflict of interest.¹ In May, Padilla moved to continue the trial date in order to retain a private attorney. After a hearing, the court granted the motion and set a status conference for June 9, 2006. The court admonished Padilla then that it would grant no more continuances and he would have to retain counsel before the status conference if new counsel were to have any input on scheduling the trial. Padilla had not retained counsel by

¹Although we have not been provided with a transcript of that hearing, the relevant minute entry suggests Padilla's counsel advised the court of "potential difficulties" with the representation.

the date of the status conference, at which the court then reset Padilla's trial for August 29, 2006. Because Padilla's appointed attorney had a scheduling conflict on August 29, the court continued the trial again, resetting it for February 13, 2007.

¶4 On the first day of trial, Padilla requested yet another postponement so he could obtain private counsel. His appointed attorney stated he believed a conflict of interest existed, as evidenced by Padilla's wish to hire different counsel, and he presented a letter from Padilla's father along with other documents showing that funds had been secured to hire Leon Thikoll, the "family lawyer" Padilla wanted. The court denied Padilla's motion, finding no conflict of interest with appointed counsel and observing that, "under the circumstances presented here, this is the time to go to trial." The court acknowledged Padilla's right to hire counsel of his choice and stated Padilla could retain Thikoll to assist in the defense. In the three-day trial that followed, Padilla was represented only by court-appointed counsel and was found guilty on both counts.

Discussion

¶5 Padilla first argues the trial court violated his constitutional right to be represented by counsel of his choice when it denied his motion to continue. He asserts the court's wrongful deprivation of this right constitutes structural error requiring automatic reversal under *United States v. Gonzalez-Lopez*, 548 U.S. 140, ___, 126 S. Ct. 2557, 2563-64 (2006).

¶6 When a trial court's ruling has the effect of denying a defendant the counsel of his choosing, we review the court's action for an abuse of discretion. *See Morris v. Slappy*, 461 U.S. 1, 11-12 (1983); *State v. Miller*, 111 Ariz. 321, 322, 529 P.2d 220, 221 (1974). A trial court has wide latitude in weighing a defendant's right to choose his attorney against competing considerations of fairness and judicial economy. *Gonzalez-Lopez*, 548 U.S. at ___, 126 S. Ct. at 2565-66. To determine whether the denial of a motion to continue violates a defendant's right to select and retain counsel, we look to the circumstances of the case, including:

whether other continuances were granted; whether the defendant had other competent counsel prepared to try the case; the convenience or inconvenience to the litigants, counsel, witnesses, and the court; the length of the requested delay; the complexity of the case; and whether the requested delay was for legitimate reasons or was merely dilatory.

State v. Hein, 138 Ariz. 360, 369, 674 P.2d 1358, 1367 (1983).

¶7 Under these criteria, the court did not abuse its discretion by denying Padilla's motion to continue on the first day of trial. Padilla's trial had been continued twice before: once at his request, in May 2006, so he could secure funds to hire a private attorney, and again in August 2006, when his appointed attorney had a scheduling conflict. In all, Padilla was given over eight months to hire private counsel, and he was explicitly told he would not receive any continuances after June 9, 2006. *See State v. Lamar*, 205 Ariz. 431, ¶¶ 32, 34, 72 P.3d 831, 838 (2003) (admonition that no further continuances would be granted was

factor in determining whether court abused discretion by denying defendant additional time to change counsel).

¶8 On the morning of trial, the court determined Padilla’s appointed counsel was prepared to try the case. Although Padilla identifies a number of alleged shortcomings in his attorney’s performance, nothing in the record suggests the representation he received fell below constitutional standards. *See Gonzalez-Lopez*, 548 U.S. at ___, 126 S. Ct. at 2563 (Sixth Amendment guarantees right to effective representation, not mistake-free representation). And, given the testimony of an undercover detective who had twice purchased drugs directly from Padilla, it is highly unlikely a different attorney would have achieved a more favorable result than appointed counsel achieved. *See Miller*, 111 Ariz. at 323, 529 P.2d at 222 (court may consider overwhelming evidence of guilt in determining whether denial of continuance violated right to counsel of choice).²

¶9 As Padilla observes, “th[e] case essentially took one day to try” and involved only two witnesses, suggesting the state would not have been greatly inconvenienced by postponing the trial date.³ But Padilla never established the length of the delay new counsel

²In his opening brief, Padilla claims he was “denied his constitutional right to effective assistance of counsel” under the United States and Arizona Constitutions. To the extent he asserts a claim of ineffective assistance of counsel, we note that issue is improvidently raised and cannot be considered on direct appeal. *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) (ineffective assistance claim must be brought in petition for post-conviction relief under Rule 32, Ariz. R. Crim. P.).

³Jury selection and jury deliberations consumed the two other trial days.

would need to prepare, and the state has a legitimate interest in bringing criminal defendants to trial expeditiously—especially when the court had already provided Padilla ample time to retain private counsel.

¶10 The trial court did not indicate, nor does the record suggest, that Padilla sought a last-minute continuance simply to delay the trial. To the contrary, the record indicates Padilla lacked the resources to hire Mr. Thikoll before the trial began. Nevertheless, the basis for a defendant’s motion to continue is merely one factor for the court to consider in these circumstances; it is not alone dispositive. The court clearly took Padilla’s financial situation into consideration and implicitly found the benefits to Padilla of a delay were outweighed under the circumstances by the competing interests in proceeding as scheduled. *See Hein*, 138 Ariz. at 368-69, 674 P.2d at 1366-67 (right to choice of counsel must be weighed against need for efficient, effective administration of justice). We do not find the court abused its discretion in denying Padilla’s motion to continue.

¶11 Padilla also contends the court failed to inquire adequately into his reasons for seeking to retain different counsel. A defendant is entitled to a change in court-appointed counsel only upon a showing of cause, and a court must inquire into the grounds for substitution when a defendant makes a “colorable claim” of either irreconcilable conflict or a total breakdown in communication with appointed counsel. *State v. Torres*, 208 Ariz. 340, ¶¶ 6, 8-9, 93 P.3d 1056, 1058-59 (2004). But, as *Gonzalez-Lopez* recently reaffirmed,

“the right to counsel of choice does not extend to defendants who require counsel to be appointed for them.” 548 U.S. at ___, 126 S. Ct. at 2565; *State v. Moody*, 192 Ariz. 505, ¶¶ 10, 11, 968 P.2d 578, 580 (1998) (indigent defendant not entitled to counsel of choice or meaningful relationship with attorney). The nature of a defendant’s request determines what level of inquiry is required. *Torres*, 208 Ariz. 340, ¶ 8, 93 P.3d at 1059. At minimum, the court must examine the basis of the defendant’s request. *Id.* ¶ 7. We review for an abuse of discretion a trial court’s denial of a request for substitute counsel. *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 8, 154 P.3d 1046, 1050 (App. 2007).

¶12 Here, Padilla did not request different court-appointed counsel nor show any colorable ground for such a substitution. Rather, he expressed dissatisfaction with his appointed attorney relative to the private attorney he wished to hire, whom he believed he could trust more and who would not be burdened by as large a caseload. Padilla even clarified in open court that he did not mean to “downplay” his appointed counsel, but he simply “fe[lt] like [he] deserve[d] a lawyer that . . . was not given to [him] by the State.” After listening to Padilla at some length, the trial court found no legal conflict nor any other cause for substituting attorneys. Its findings are amply supported by the record, and case law similarly supports its legal conclusion. *See State v. Cromwell*, 211 Ariz. 181, ¶¶ 35-36, 119 P.3d 448, 454-55 (2005) (no irreconcilable conflict when defendant acknowledged appointed attorney’s competence); *Paris-Sheldon*, 214 Ariz. 500, ¶ 14, 154 P.3d at 1051 (loss of trust not sufficient cause for substitution).

¶13 Relying on *United States v. Welty*, 674 F.2d 185, 187 (3d Cir. 1982), Padilla argues the trial court was required to inquire into his reasons for requesting *private counsel* in order to determine whether there was cause to postpone the trial. Although this is not the law in Arizona, the record nonetheless illustrates clearly that the court did not deny Padilla’s motion to continue because it lacked information or failed to understand his circumstances. After meeting with counsel in chambers and discussing the matter in open court, the court determined Padilla’s trial should proceed as scheduled. Nothing in the record suggests the court abused its discretion.

¶14 Because we find no error, structural or otherwise, we affirm Padilla’s convictions and sentences.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge